Gorges/Quik-To-Fix Foods, Inc. *and* United Food and Commercial Workers, Local Union 540. Case 16–CA–18633–2

February 17, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On May 1, 1998, Administrative Law Judge William N. Cates issued the attached bench decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

David T. Garza, Esq., for the General Counsel.
Charles H. Morgan, Esq. and *R. Lindsay Marshall, Esq.,* for the Respondent.

[1] No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) of the Act by maintaining overly broad work rules regarding solicitation, by unlawfully assisting an employee with the circulation of a decertification petition, and by selectively or disparately allowing an employee to circulate a decertification petition during working time.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Charging Party excepts only to the judge's finding that employee Maria Chapa did not solicit signatures on the decertification petition during working time. The Charging Party argues that the judge failed to discuss, and did not discredit, the testimony of employees Camelo Hernandez, Augustin Pimental and Filiberto Gutierrez that Chapa solicited signatures for the decertification petition during her working time. Although the Charging Party is correct that the judge did not explicitly discredit these three witnesses, we find that the judge implicitly did so. In this connection, we observe that the judge found that "there is no showing on this record, of a conclusive nature, that either Chapa or Turner solicited or obtained signatures on the decertification petition at a time other than non-work time." The judge further found that "if there is any evidence [contrary to the recommendation that the complaint be dismissed] I do not find it to be either persuasive or credible." These findings constitute an implicit crediting of Chapa's testimony that she did not solicit signatures on worktime. We find no basis for overturning that credibility resolution. In addition, even if Chapa did solicit signatures on worktime, as asserted by the Charging Party, we could not find unlawful disparate enforcement of the Respondent's no-solicitation rule without a finding that the Respondent was aware of the worktime solicitation and nonetheless allowed it to occur. See *Summitville Tiles*, 300 NLRB 64, 66 fn. 11 (1990). Here, there is no such finding by the judge, and the Charging Party failed to except to the judge's failure to so find. Accordingly, we affirm the judge's dismissal of the complaint.

James L. Hicks, Jr., Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in proceedings conducted in Fort Worth, Texas, on February 12 and 13, 1998. At the conclusion of trial proceedings, and after hearing oral argument by Counsel for General Counsel (Government), Counsel for Gorges/Quik-To-Fix Foods, Inc. (Company), and Counsel for United Food and Commercial Workers, Local Union 540 (Union), I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations, setting forth findings of fact and conclusions of law, including my ultimate conclusion that the unfair labor practice complaint lacked merit and should be dismissed.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found the Company did not, through its agents and supervisors, assist an employee with the circulation of a decertification petition. I likewise concluded the Government failed to establish, by creditable testimony or other evidence, that the Company selectively and disparately enforced employee conduct rules by allowing an employee to circulate a decertification petition during working time. I recommended the complaint be dismissed in its entirety.

I certify the accuracy of the portion of the transcript,[1] as corrected,[2] pages 246 to 257, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

Exceptions may be filed in accordance with Section 102.46 of the Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my Bench Decision shall automatically become the Board's decision and order.

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act, as amended, (Act), and has not violated the Act in any manner alleged in the complaint.

ORDER[3]

The unfair labor practice complaint is dismissed.

APPENDIX A

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JUDGE CATES: On the record.

Let me state that it has been a pleasure to be in Fort Worth, Texas and to hear this case. Counsel for each side, or each

[1] The certification of this Bench Decision was delayed by the filing of bankruptcy by the official contract court reporting service. The transcript was received by this office on April 23, 1998.

[2] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question. [Errors in the transcript have been noted and corrected.]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

party, presented their evidence in a very logical and orderly manner, articulated in opening statements and closing arguments their positions, and I have had very little to do other than sit back and listen to the testimony as it has come in. Each Counsel is a credit to the party they represent.

This is my decision. I find the charge in this proceeding was filed by the Union on June 17 and amended on September 3, 1997. I find the company is a Delaware corporation with an office and place of business in Garland, Texas, where it is engaged in the business of producing fully cooked and ready to cook meat products.

I further find that during the preceding twelve months, which is a representative period, the company in conducting it's business operations, purchased and received at it's Garland, Texas facility, goods valued in excess of $50,000 directly from

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points outside the state of Texas.

I find the company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find the United Food and Commercial Workers Local Union 540 is a labor organization within the meaning of Section 2(5) of the Act.

I find the individuals listed in paragraph 6 of the complaint and more specifically, Reyes, Ryback, Vargas, Williams, Jose Hernandez and, I have written over the top of the production supervisor's name, it started with an "M," Menes, yes. Also, there was one other person that I had written over their name and that's the vice-president of Human Resources. What was his last name? Alverez, yes. I find that each of those are supervisors within the meaning of Section 2(11) of the Act and they're agents of the company within the meaning of Section 2(13) of the Act.

In deciding whether or not the company had a no-solicitation rule, ambiguously, cleverly or otherwise written, and whether or not it was disparately enforced, and whether or not the company, through Mr. Reyes, assisted in the circulation of a decertification petition, I shall be governed by applicable Board law and please allow me to briefly outline a portion of the law that I think is applicable in this case.

The law is clear that an employer must stay out of any effort to decertify an incumbent Union. After all, the employer

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is duty bound to bargain in good faith with the Union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such a petition, where the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes planting the seed for the circulation and filing of a petition, providing assistance in it's wording, typing or filing with the Board, and knowingly permitting it's circulation on work time.

Of course, if an employee, with apparent authority circulates the petition, the company or employer is accountable under settled principles of agency, and I shall not cite the long list of cases that would support that proposition.

First, I shall address whether or not the company provided any assistance in the initial development or the initial drafting or the initial circulation of the petition.

I find the evidence herein indicates that employee, Chapa, asked management, in particular Human Resources Manager, Williams, for the phone number of the National Labor Relations Board with respect to whatever information she wanted from the Board.

The evidence tends to bear out employee Chapa's testimony on that particular point, in that the National Labor Relations Board, through one of it's agents, I believe it was Alverti, it's not important who for the purposes of this decision, on

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June 4, 1997, informed Ms. Chapa of what needed to be done to create, circulate and provide a petition with respect to decertification of the Union.

She testified, and there was no evidence presented to the contrary, that neither Mr. Williams nor anyone else, encouraged her to prepare a decertification petition or circulate it among the employees.

There was an indication that she listed a certain number of employees as being in the unit. How did she arrive at that number? She indicated she made an inquiry and that an official of the company provided her the number of production and maintenance employees.

That official confirmed that when she testified and said not only that, but she had, other employees on numerous occasions, ask the number of production and maintenance employees or the number of employees employed by the company.

In fact, she indicated she had an inquiry most recently and I believe she said the number was two hundred and ten at the present, as opposed to one hundred and eighty six when this inquiry was made.

So, I find there is no indication on this record the company instituted or assisted in the circulation of the petition in it's initial efforts.

I also find that we are speaking to a very narrow window of time. We're not speaking about more than a few days. I

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believe Ms. Chapa indicated that she contacted the National Labor Relations Board on or about June 3.

The letter from the Board to her is dated June 4. The petition shows that it was filed, the decertification petition shows it was filed on the 13th, I believe it was, and Ms. Chapa testified she clocked out of the plant, went to the post office, mailed the petition on June 10, and the records tend to support her testimony to that effect.

At least the exhibit, Respondent 3, indicates that on June 10, she clocked out at 8:28 a.m. and clocked back in at 9:04 a.m. Obviously, it doesn't say where she went, but at least it supports Chapa's testimony that she filed the petition at that period of time.

I only say all of that to say this. That we're not talking about a large frame of time from the initial action toward a decertification petition and the actual filing of the petition.

The government alleges in paragraph 8 of the complaint, and the company does not deny, that the three rules set forth therein, listed as sub-paragraphs A, B and C, are part of the rules of the company. However, I note for the record that those are not the only three. They come from a large list of rules.

The Union argues these rules are ambiguous and cleverly so, that they really constitute no-solicitation rules. I do not find that to be the case. I do not find the rules

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on their face are invalid.

I am persuaded that when the company, the current company, George's Quick to Fix Foods, Inc., took over from Tyson

Food, it held meetings with the employees and conveyed to them they were not to solicit on work time.

And it may not have been clear, or at least as clear as it could have been, whether they could do it on their own time or not.

However, I don't have to address that issue because there's no dispute on this record, in my opinion, but that if the company had any rule that could be construed to be a no solicitation rule, that it did not apply during break times.

There's evidence, somewhat overwhelming in this record, that the employees could engage in almost whatever conduct they chose during their break time, assuming, obviously, they didn't commit some unlawful act or crime.

It's quite clear that during break times, the employees engaged in all sorts of solicitation. There's evidence that Avon products were sold, Girl Scout cookies were sold, football pools, baseball pools, raffles. One of the witnesses spoke about a raffle for a blanket, which that witness had won, herself.

There is no question, at least in my mind, that the rules set forth in paragraph 8 are not invalid on their face and if there were stricter rules regarding solicitation,

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they were honored in the breech during nonworking times.

That does not, however, dispose of the issue of whether or not Chapa, who appears to be one of two employees who were in the forefront of the decertification petition, solicited signatures during working times and whether the company knew of that and whether they tolerated it.

There was evidence provided in the form of testimony through Hernandez, Carmelo Hernandez, that Chapa may have been soliciting signatures during work time.

And, in fact, he spoke with the vice-president of Human Resources about that matter and the vice-president of Human Resources told him he would look into it and Mr. Hernandez went further and said words to this effect, "What if I were soliciting for the Union?", and he was told one could be disciplined, even to the point of being fired if it took place.

I think his testimony was, what would happen to one of us if we did such as he indicated he had seen Chapa doing. I believe the reason he referred to "one of us" is, the record demonstrates Mr. Hernandez was a Union Steward.

The Union and the General Counsel take the position that constitutes disparate enforcement of the rule. I'm not persuaded it does for the simple reason there's no indication the vice-president of Human Resources would have treated it any differently had it been a decertification petition as opposed to a Union petition.

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He said he would look into it. He's not conceding that what Mr. Hernandez has told him is accurate. He just says he will look into it, that he will speak to Mr. Williams about it and if it takes place on work time for the Union, then yes, there would be discipline administered, up to and including discharge.

So I don't find any unlawful action based on the comments of the vice-president of Human Resources, Alvarez, I believe was his name, when he spoke to Hernandez about that.

Then you have a further claim of assistance by the company on the decertification petition, in which I believe it was Campuzano who testified she observed Debbie Turner, who I think everyone acknowledges was pro decertification petition, and second shift production manager, Reyes, about which Campuzano testified, (the spelling of that name is Campuzano, Court Reporter, in the event my hillbilly accent does not come across correctly) she saw Debbie Turner with a paper with signatures on it and that Mr. Reyes and Ms. Turner were counting the signatures on the paper, and that the comment was made as she passed by, "We're almost to the point we need to be."

Further, Campuzano contends that this took place at a time when Turner was working and it is urged I should conclude and find this violates the Act as unlawful assistance.

I'm not inclined to do so for the following reasons.

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There is, in my opinion, no conclusive evidence that Turner was on work time as opposed to non-work time.

Campuzano stated first there may have been some others in the room at the time, but she said the majority had already returned to the job site, and then she was not as clear as she could have been on whether it was just the two of them there or not.

Secondly, I am persuaded there is no conclusive evidence that whatever papers Turner and Reyes had, assuming they were together with a paper, was a decertification petition.

Among other things, Campuzano said she didn't read the paper. She couldn't recall what color it was. So, I'm not fully persuaded that there is sufficient conclusive evidence that it was the petition based on the testimony viewed most favorable for the General Counsel from the witnesses he called.

However, when I tie that in with the testimony of Turner, that she kept the petition in her locker at all times and that she didn't bring it out because she was under an instruction or impression from the government, from the National Labor Relations Board, that if she got any signatures on work time, the petition would become null and void.

The reason I'm persuaded that bit of testimony of Turner is true, that she kept it in the locker at all times, is because while she was testifying, for example, she wanted to

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lecture us, until I cut her off, on what the law was. She started to say, "It's not illegal to do such and such," and she sometimes tried to volunteer more information than she was asked.

So, I think she was a person who perceived that what she was doing was important and she didn't want to mess it up, and that she did not keep the petition outside her locker because she believed, rightly or wrongly so, that it would void the petition. Also, you have the credited testimony of Reyes that no such conversation took place.

So I find there is no showing on this record, of a conclusive nature, that either Chapa or Turner solicited or obtained signatures on the decertification petition at a time other than nonwork time.

I have viewed all of the evidence in light of the fact there is really no credible evidence on this record that demonstrates an anti-union animus on the part of the company toward the Union or to the unionization of it's employees. It appears the company recognized the Union, perhaps even reached an agreement with them, and then along came the advent of the decertification petition.

So, in summary form, I find the published rules the government set forth in the complaint, are not invalid on their face.

I further find the government has failed, by any

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credible and conclusive evidence, to establish that the company selectively or disparately enforced any rule or assisted in the circulation of any decertification petition during working time, or that the company was in any unlawful way involved in the initial actions that led to the decertification petition.

In fact, the entire case boils down to this one point, which is: I find the employees involved in the decertification petition did not seek or obtain any unlawful assistance from the company and none of their actions would cause me to draw the conclusion that anyone would reasonably believe the company was sponsoring or instigating or promoting the circulation and collecting of signatures for or in the filing of the decertification petition.

Having so concluded and for the reasons stated, I will recommend the complaint be dismissed in it's entirety and if there is any evidence to the contrary, I do not find it to be either persuasive or credible, and as soon as the Court Reporter provides me a copy of the transcript, I will certify the same to the Board, and it is my understanding that any appeals period runs from that time forward.

Please be advised to follow the Board's rules and regulations rather than my understanding of them, because you'll be on much safer ground. But, I do believe that the appeals period runs from my certification of the transcript pages as the decision.

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The case here, in final form, did not rise above the level of suspicious conduct. There just simply was not hard evidence of a credible nature to support the allegations of the complaint.

I thank each of you for being here. Madam Court Reporter, if you would serve a copy of the transcript and exhibits on us at the office indicated. I thank each of you and this trial is closed.

(Whereupon, the hearing in the above entitled matter was closed at 1:25 p.m.)